ADDENDUM A

THEODORE R. KULONGOSKI
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[State of Oregon Seal]

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 7, 1997

Margaret A. Hoffman
Karen O'Kasey
1211 SW Fifth, Suite 1600
Portland, OR 97204

Jeffrey Wihtol
2121 SW Broadway
Suite 100
Portland, OR 97201

John Paul Graff
2121 SW Broadway
Suite 100
Portland, OR 97201

Kathryn H. Clarke
921 SW Washington Street
Suite 764
Portland, OR 97205

Re: *Axen v. American Home Products Corporation*
DOJ File No. 137-760-GH0295-97

Dear Counsel:

I represent the Oregon Department of Justice Criminal Injuries Compensation Account, a judgment creditor as to the punitive damages portion of the award in the above matter. *See* ORS 18.540 (former). The purpose of this letter is to outline the Department of Justice's policy with respect to future actions in this case.

The Department of Justice is now an interested party in this proceeding. I have received a copy of the Notice

of Appeal. Please send all future pleadings, notices, briefs and similar documents to my attention at the address given above.

The judgment debtor in this matter should pay the Criminal Injuries Compensation Account's portion of the award directly to the Department of Justice, rather than to another judgment creditor. ORS 18.540 authorizes the Department of Justice to seek reimbursement from other judgment creditors who have received a portion of the Department of Justice's share of the punitive damages award.

The judgment debtor should make payment payable to the *Criminal Injuries Compensation Account*. Payment should be mailed to the Department of Justice, Crime Victims Assistance Section, 1162 Court Street NE, Salem, OR 97310.

Finally, I will outline the Department of Justice's policy regarding settlement of punitive damages cases. In each case, we first calculate what percentage of the entire judgment would go to the Department of Justice. We are willing to agree to any settlement which gives us the same proportionate share. For example, if under a total judgment for $100,000, DOJ's share would be $20,000, we will approve any settlement amount if we receive 20 percent of the settlement. So if the parties agree to settle the case for a total of $40,000 DOJ will agree to the settlement if we receive $8,000. It does not matter how the parties designate the settlement payment. Even if the parties agree between them that the entire settlement is for economic damages, the Department of Justice will only agree to a settlement if we receive our proportionate share as described above. Any deviations from this policy must be approved by the Deputy Attorney General, David Schuman, and are seldom done.

Please contact me if you have any questions. Thank you for your attention to this matter.

Sincerely,

/s/ Kristin N. Preston
KRISTIN N. PRESTON
Assistant Attorney General
Human Services Section

c: Jason Barber, Crime Victims Assistance Section
Christopher McCracken
Rodney Norton

ADDENDUM B

HARDY MYERS
Attorney General

DAVID SCHUMAN
Deputy Attorney General

[State of Oregon Seal]

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 23, 1999

Clerk
Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

Supreme Court Case No. 99-784
American Home Products Corporation v. State of Oregon

Dear Clerk:

Petitioner American Home Products Corporation filed a petition for a writ of certiorari naming the State of Oregon as a respondent. For reasons set forth below and in respondent Axen's brief in opposition, the State of Oregon is not a party in this matter. Therefore, the State will not be filing a brief in opposition to the petition.

In the trial court, the State of Oregon was named as a defendant but was dismissed before trial and took no further part in the proceedings. Judgment was entered for respondent (plaintiff below) Axen. Because the jury awarded Axen punitive damages, and under Oregon law the State shares in any punitive damages recovery, the State was named as a creditor in the judgment.

American Home Products (defendant below) appealed the judgment to the Oregon Court of Appeals. Under Oregon practice, the notice of appeal must designate all of the parties named in the trial court and indicate which of those parties are adverse to the appellant on appeal. Or. Rev. Stat. § 19.250(1). In its notice, American Home Products designated the State of Oregon as a party in the trial court, but appropriately did not designate the State as an adverse party on appeal.

Axen cross-appealed from the judgment entered in the trial court to the extent that the judgment made the state a judgment creditor as to a portion of the punitive damages. Axen challenged as unconstitutional Or. Rev. Stat. § 18.540, the statute that makes the State automatically a judgment creditor with an interest in any award of punitive damages. Axen designated the State as an adverse party in its notice on appeal.

The State and American Home Products [*sic*—Axen] jointly moved to dismiss Axen's cross-apeal for lack of jurisdiction. The Oregon Court of Appeals granted that motion, concluding that no justiciable controversy existed among the parties to the case as to the question of the sharing of the punitive damages award. Moreover, the court concluded that the question of whether Axen was required to share the punitive damages award with the State could be resolved in further proceedings once the judgment became final following the appeal. A copy of the court's order dismissing Axen's cross-appeal is attached to this letter. The State thereafter did not participate in the appeal. Its sole interest in this matter is as a non-party judgment creditor with respect to a portion of the punitive damages awarded to the respondent.

While the State is not a party to this proceeding at this stage, it does have an interest in the issues presented. For

the reasons set forth in Axen's brief in opposition, the State urges this Court to deny the petition.

Very truly yours,

/s/ Michael D. Reynolds
MICHAEL D. REYNOLDS
Solicitor General
State of Oregon

Cc: John G. Kester, attorney for petitioner
John Paul Graff, attorney for respondents
Jeffrey B. Wihtol, attorney for respondents
Walter Sweek, attorney for Wal-Mart Stores, Inc.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Multnomah County Circuit Court No. 9509-06363

CA A97249

DOUGLAS J. AXEN,
Plaintiff-Respondent,
Cross-Appelleant,

and

SANDRA AXEN,
Plaintiff-Respondent,

v.

AMERICAN HOME PRODUCTS CORPORATION through its pharmaceutical division, Wyeth-Ayerst Laboratories,
Defendant-Appellant,
Cross-Respondent,

STATE OF OREGON,
Defendant-
Cross-Respondent,

and

WAL-MART STORES, INC.,
Defendant.

ORDER DISMISSING CROSS-APPEAL

The State of Oregon and plaintiff Douglas Axen have filed a joint motion, and amended motion, for dismissal, for lack of jurisdiction, of plaintiff's cross-appeal from that portion of the judgment giving the State of Oregon an interest in the punitive damages awarded by the trial

court on the ground that ORS 18.540, which makes the State of Oregon a judgment creditor with an interest in an award of punitive damages, is unconstitutional.

The court determines that the State of Oregon, in its capacity as a party with an interest in punitive damages collected by plaintiff, was not a party to the case when the trial court entered the judgment that included punitive damages. Defendants American Home Products Corporation, Wal-Mart Stores, Inc., and the State of Oregon in its capacity as a named defendant in the action are not adverse to plaintiff with respect to the matter of the interest of the State of Oregon in any punitive damages collected by plaintiff or plaintiff's contention that ORS 18.540 is unconstitutional. Because there was no adverse party as to the State's interest in an award of punitive damages matter, there was no justiciable controversy as to that issue and there can be no appellate jurisdiction without a justiciable controversy. *Oregon Medical Assn. v. Rawls*, 281 Or 293, 574 P2d 1103 (1978); *Brumnett v. Psychiatric Sec. Review Bd.*, 315 Or 402, 848 P2d 1194 (1993).

Further, the court determines that an alternative and adequate forum exists in the trial court for the resolution of any potential controversy between plaintiff and the State of Oregon in its capacity as a judgment creditor of the award of punitive damages if and when: (1) an award of punitive damages is affirmed on appeal; (2) the judgment becomes final following this appeal; and (3) plaintiff collects or seeks to collect any punitive damages and the State of Oregon asserts an interest in those damages. *Barger v. Taylor*, 30 Or App 228, 42 P 615 (1895). The motion to dismiss the cross-appeal is granted. The case title is amended as set forth in the attachment to this order.

The parties have filed a stipulated motion to supplement the record with a transcript of the deposition of Dr. Jack McAnulty, a copy of which is attached to the motion. The motion is granted.

Respondent's brief is due 28 days from the date of this order.

Cross-appeal dismissed; no costs allowed.

/s/ Mary J. Deits
Chief Judge

Apr. 15, 1998
Date

c: John Paul Graff
Jeffrey B. Wihtol
Kathryn Hall Clarke
Mary Williams
Karen O'Kasey
Multnomah County Circuit Court

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97310